

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
Special Access Rates for Price Cap Local	)	WC Docket No. 05-25
Exchange Carriers	)	
	)	
AT&T Corp. Petition for Rulemaking to	)	
Reform Regulation of Incumbent Local	)	RM-10593
Exchange Carrier Rates for Interstate Special	)	
Access Services	)	

**To:** The Federal Communications Commission

**COMMENTS  
OF THE  
AMERICAN PETROLEUM INSTITUTE**

The American Petroleum Institute ("API"), by its attorneys, hereby files these Comments in response the Public Notice requesting parties to "refresh the record" in the above referenced proceeding in light of several factors, including the "number of significant mergers and other industry consolidations" since the initiation of this proceeding.<sup>1</sup>

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<sup>1</sup>*Parties Asked to Refresh the Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, FCC 07-123, released July 9, 2007 ("Public Notice"). Due in substantial part to the AT&T Petition for Rulemaking, the Federal Communications Commission ("Commission") requested comment on the appropriate level of regulation for special access services, particularly the rules that should follow the expiration of the CALLS plan, including whether to maintain or modify the Commission's pricing flexibility rules for interstate special access services. *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access NPRM*").

## **I. PRELIMINARY STATEMENT**

API is a national trade association representing approximately 400 companies involved in all phases of the petroleum and natural gas industries, including the exploration, production, refining, marketing and transportation of petroleum, petroleum products and natural gas.

The API Telecommunications Committee is one of the standing committees of the organization's General Committee on Information and Technology. The Telecommunications Committee evaluates and develops responses to state and federal proposals affecting the telecommunications facilities and services used in the oil and gas industries.

API member companies include several of the largest corporations in the United States. Many others listed in the Fortune 500. Corporate offices and campuses are located in major metropolitan areas and in less well traveled locations, such as Findlay, Ohio and Bartlesville, Kansas. Refineries, crude and refined petroleum products pipelines, natural gas and natural gas liquids pipelines, gas and petroleum gathering systems and production facilities are located in 2<sup>nd</sup> and 3<sup>rd</sup> tier cities and in remote areas of the Lower 48, Alaska and the Gulf of Mexico.

In addition to the voice and corporate data communications requirements of comparably-sized corporations in other industries, API member companies must procure or self-provision services to ensure the uninterrupted transmission of supervisory control and data acquisition ("SCADA") from thousands of valves and control points along pipelines and gathering systems and routinely transmit very large files of geophysical data from production and exploratory wells located throughout the country and world to domestic and foreign data centers. The vast preponderance of the petroleum industry's principal business centers and infrastructure within the Lower 48 fall within the footprint of the incumbent local exchange carrier (ILEC) service territories of the

Regional Bell Operating Companies now consolidated within AT&T: the former Ameritech, Pacific Bell, SBC and BellSouth.

## II. COMMENTS

In granting the applications of AT&T and BellSouth permitting their merger, the Commission adopted a series of conditions applicable to special access services apart from ordering AT&T's divestiture of interests in a substantial portion of AT&T's Type 1 special access facilities located in the BellSouth service territory. Most importantly, the Commission required AT&T to "roll back" the rates established "pursuant to the Phase II Pricing Flexibility Provisions of its special access tariffs" to rates no higher than the tariff rates for the same special access services within the AT&T/BellSouth in-region territory "where it has not obtained Phase II pricing flexibility."<sup>2</sup> The Commission implicitly recognized that the Phase II Pricing flexibility established in 1999 was based on expectations of competition that proved misplaced. In so many respects, this condition and the balance of the Special Access Merger Conditions imposed by the Commission resonate with today's marketplace realities for special access services and provide the starting point for special access rate regulation policies.

The "significant mergers and other industry consolidations" since adoption of the *Special Access NPRM* have been profound. The former largest interexchange carriers, AT&T and MCI, are now part of the two mega-carriers that dominate the market for services used by large business customers. The "new" AT&T and Verizon are, by far, the Nation's two most significant providers of interexchange telecommunications communications services and dedicated Internet access services, domestically and globally, for large business customers.

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<sup>2</sup> *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, Special Access Merger Condition No. 6, Order on Reconsideration, 22 FCC Rcd 6285 (2007).

Their domestic wireline footprints are unparalleled in terms of local access lines and infrastructure. Their Internet backbones are among the most significant, if not the largest, in the United States networks. The mega-carriers control the two largest domestic wireless carriers.

Consolidation in the telecommunications industry only strengthens the case for retaining/imposing price cap regulation for interstate special access services of the price cap LECs. In connection with the AT&T and BellSouth merger, the most favorable statement that may be made with respect to competition in the market for interstate special access services was that the proposed merger did not significantly impair the competition in the market for special access services in that BellSouth dominated the market in its in-region service territory before the merger and would do so afterwards.<sup>3</sup> In those instances in which AT&T's local infrastructure had a cognizable competitive presence in BellSouth territories, AT&T was required to divest its local infrastructure. An unfortunate consequence of both the MCI-Verizon merger and the AT&T-SBC and AT&T-BellSouth mergers is that substantial portions of the competitive last mile infrastructures of two of the largest facilities-based competitive local exchange carriers ("CLECs"), the pre-merger, standalone MCI and AT&T, were sold or are being sold to carriers that lack the scale and scope of both the former interexchange carriers and the two mega-carriers.

Consistent with their industry leading scale and scope, the two mega-carriers are making unprecedented investments in Fiber-to-the-Home (FTTH) infrastructure for the delivery of high speed data, voice and multi-channel video entertainment services.<sup>4</sup> However, the FTTH infrastructure of each mega-carrier is being deployed predominantly, if not exclusively, in states

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<sup>3</sup> *AT&T Inc. and BellSouth Application for Transfer of Control*, at ¶¶51-55.

<sup>4</sup> *Public Notice*, n 10.

and areas in the in-region service territories of the mega-carriers' ILECs.<sup>5</sup> Thus, investments in FTTH infrastructure can only be expected to strengthen the mega-carriers' dominant position in local infrastructure and in the market for special access services in their in-region ILECs' service territories.

The realities of industry consolidation with regard facilities-based special access competition are reflected in recent statements of Time Warner Telecom Inc. In 2005, this CLEC was portrayed as a substantial, facilities-based special access and local service competitor to BellSouth.<sup>6</sup> In its most recent Form 10-K, this CLEC confirms that its growth potential in BellSouth's ILEC service areas is being adversely affected by the BellSouth-AT&T merger, and strongly suggests that, at best, the mergers giving rise to the mega-carriers will be neutral with respect to future prospects for facilities-based local competition:

Our revenue from AT&T (which merged with SBC in 2005 and with BellSouth in 2006) has been and may continue to be impacted by the combined company buying less local transport from us in SBC's former local service area and may also be similarly impacted by the BellSouth merger. However, the impacts of these AT&T consolidations may be mitigated by revenue commitments in our agreement with AT&T, new product opportunities, and opportunities to sell additional local services to AT&T outside of its local service region.<sup>7</sup>

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<sup>5</sup> *Ibid.* See Letter from Jim Lamoureux, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC (filed June 2, 2006 in *IP-Enabled Services*, WC Docket No. 04-36; *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*, MB Docket No. 05-311) (AT&T access network is the backbone for the carrier's FTTH technology and its delivery of voice, data and video services to residential customers); Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC (filed May 11, 2006 in *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311) (Verizon "wire centers [are the physical locations as opposed to cable franchise areas] on which Verizon upgrades its network to fiber").

<sup>6</sup> *Reply Comments of BellSouth* at 35-37, Attachment 5, WC Docket No. 05-25 (July 29, 2005).

<sup>7</sup> See *Time Warner Telecom, Inc. Form 10-K, For Fiscal Year ended December 31, 2007*, at 12. *Id.* at 13. Available at [http://www.twtelecom.com/Documents/Announcements/Financial\\_Docs/2006/10K\\_TWTC\\_as\\_filed-2006.pdf](http://www.twtelecom.com/Documents/Announcements/Financial_Docs/2006/10K_TWTC_as_filed-2006.pdf), (last viewed on August 8, 2007.)

This CLEC further notes that as wireless carriers are acquired by the mega-carriers, the wireless carriers are disconnecting Time Warner's services in favor of their affiliated ILECs' special access services.<sup>8</sup>

The petroleum industry's view of industry consolidation and special access services may be summed up by the phrase, "the more things change, the more they remain the same." For member companies, the price cap ILECs remain the predominant providers in all of the major special access service categories.<sup>9</sup> The second largest group of special access carriers providing service to company locations are the independent rural telephone carriers and telephone cooperatives. The CLECs, including principally the major cable operators, constitute a distant, third category of access providers. Very limited DS-1 service, as a percentage of the total of DS-1 access circuits acquired by member companies' interexchange carriers, are provided by CLECs.<sup>10</sup> This trend is even more pronounced in rural areas. For many API member companies, upwards of 40% of their facilities, at which interexchange traffic originates or terminates over DS-1 special access services, are located in medium-to-small towns and rural/remote areas, as compared to 1<sup>st</sup> or 2<sup>nd</sup> tier metropolitan areas. In these areas, CLECs are virtually non-existent. Price cap ILECs or rural telephone companies or cooperatives are the access service providers in these areas.

The recent study by the Government Accountability Office underscores that CLEC last mile access facilities reach a small fraction of commercial buildings in the United States that are

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<sup>8</sup> *Id* at 13.

<sup>9</sup> DS-1, DS-3, Ethernet, OC-3, DC-N, and Gigabet Ethernet.

<sup>10</sup> For purposes of discussion, we include Time Warner Telecom Inc. along with Cox and Comcast as cable operators, in that TWT acquires substantial infrastructure from cable system operators.

capable of supporting DS-1 and DS-3 facilities.<sup>11</sup> The GAO Report projects demand for DS-1, DS-3 and multiple DS-3 access services in office buildings located in 16 metropolitan statistical areas. Its methodology and underlying data are fully disclosed and it quantifies special access competition based on terminations into commercial buildings (Type I special access competition), thereby eliminating instances in which ILEC facilities constitute a portion of the special access infrastructure. The very low penetration rates for CLEC facilities into buildings capable of supporting DS-1 services or greater (5.8%) and those capable of supporting demand for DS-3 services (15.3%) are consistent with the data provided in the AT&T Petition for Rulemaking demonstrating the absence of facilities-based competition for special access services.<sup>12</sup>

As noted previously by AT&T and others, the “predictive judgment” on the emergence of competition that supported “Phase II pricing flexibility” remains ill-founded and unsupported.<sup>13</sup> The limited presence of facilities-based competitive special access services in major metropolitan areas and, we can reasonably conclude, the virtual absence of competitors in smaller towns and rural areas does not support price deregulation as contemplated by the Phase II Pricing flexibility or any other substantial form of special access pricing flexibility for the price cap LECs.

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<sup>11</sup> Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report 07-80 (Nov. 2006) (*GAO Report*).

<sup>12</sup> *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Petition for Rulemaking, at 29-30 (filed Oct. 15, 2002) (“*AT&T Petition for Rulemaking*”), at 29-30, Declaration of Kenneth Thomas.

<sup>13</sup> *AT&T Petition for Rulemaking*, at 12-15.

In view of the limited extent of facilities-based competition for special access services and industry consolidation, the Commission should take the following actions:

1. All price cap ILECs should be required to roll back the rates established pursuant to Phase II Pricing flexibility to the rates in effect in their service areas where these carriers have not obtained pricing flexibility.
2. Reinstate price cap regulation with an appropriate “X-Factor.” The judicially approved 5.3% X-Factor initially proposed as an “interim” stopgap pending resolution of the Special Access NPRM provides the “floor” or minimum “X-Factor.” Productivity gains and other efficiencies previously noted by the Commission<sup>14</sup> and other parties clearly support a much higher X-Factor.
3. Any form of pricing flexibility should be based on objective indices of competition, principally the presence of substantial Type 1 facilities-based competition within an MSA. Further, any pricing flexibility must be limited to the ability to adjust prices downward. The unintended result of dominant carriers raising rates due to misplaced “competitive triggers” should not be avoided.

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<sup>14</sup> Special Access NPRM, ¶¶131.

## **CONCLUSION**

**WHEREFORE, THE PREMISES CONSIDERED**, the American Petroleum Institute respectfully urges the Federal Communications Commission to align the regulation of interstate special access service rates of the price cap ILECs consistent with marketplace realities and take such other action consistent with the views expressed herein.

Respectfully submitted,

**TELECOMMUNICATIONS COMMITTEE  
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Date: August 8, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on this 8<sup>th</sup> day of August, 2007, the foregoing Comments of the American Petroleum Institute were submitted electronically to the Federal Communications Commission and served via electronic mail upon the following:

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